Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH SETTLES and IOANE TUA,
Petitioners,

vs.

MICHAEL PENILLA, Administrator
of the Estate of Juan Penilla, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Lower courts have split on a question left unanswered by *DeShaney* v. *Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989): Is there a "danger enhancement" exception to the rule that states have no duty, under the Due Process Clause, to protect citizens from private harm?

2. Does a man who has collapsed on his front porch have a substantive due process right to emergency medical care from police officers who help him enter his home?

3. Does the Fourth Amendment require police officers who respond to a "911" call to obtain a warrant before helping a collapsed man off of his front porch and into his home?

List of Parties

The parties to the Ninth Circuit appeal of which this Petition seeks review are:

1. Joseph Settles;

2. Ioane Tua;

3. Maria Penilla, now deceased; and

4. Michael Penilla, who has succeeded Maria Penilla as administrator of the Estate of Juan Penilla, deceased.

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No.

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JOSEPH SETTLES and IOANE TUA,
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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners JOSEPH SETTLES and IOANE TUA respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit published its opinion as *Penilla* v. *City of Huntington Park*, 115 F.3d 707 (1997) (*per curiam*).

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on June 6, 1997. It denied Petitioners' timely petition for rehearing on July 18, 1997. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review the Ninth Circuit's judgment on a writ of certiorari.

CONSTITUTIONAL CLAUSES AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

42 U.S.C. § 1983 provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

STATEMENT OF THE CASE

This is a civil rights case. Its genesis was the 1994 death of Juan Penilla ("Penilla"). Petitioners are two police officers who helped Penilla enter his home the day before he died. *Penilla*, 115 F.3d, at 708.

Basis of District Court Jurisdiction

Penilla's estate sued Petitioners in district court. The complaint alleges that Petitioners violated Penilla's Fourth and Fourteenth Amendment rights by entering his home and failing to provide him with medical care. *Id.*, at 708–10.

The estate seeks monetary compensation for Penilla's death under 42 U.S.C. § 1983.[1] The basis for the district court's jurisdiction is 28 U.S.C. §§ 1331 and 1343(a)(3).

Summary of Allegations

The complaint alleges the following: Late one morning, Penilla was on his home's porch. He became seriously ill while trying to enter his home through the front door.[2] Neighbors and a passerby attempted to assist him and telephoned "911" for emergency medical services. *Id.*, at 708.

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[1] The complaint includes other parties and claims that are not pertinent to this Petition.

[2] The Ninth Circuit's opinion neglects to mention that Penilla was trying to enter his home when he collapsed. Paragraph 11 of the complaint alleges that " . . . PENILLA was at his residence . . . on the porch area *attempting to enter his front door* when he became seriously ill . . . ." Complaint, at 4 (emphasis added). Petitioners called this omission to the Ninth Circuit's attention in a petition for rehearing.

Petitioners arrived in response to the "911" call. They examined Penilla, found him to be in grave need of medical care, canceled the request for paramedics, broke the lock and door jam on Penilla's front door, moved Penilla into the house, locked the door and left.[3] *Id.*

The next day, family members found Penilla dead from respiratory failure on the floor inside the house. *Id.*

Summary of Proceedings Below

Pursuant to Fed.R.Civ.P. Rule 12(b)(6), Petitioners moved to dismiss the complaint on the basis of qualified immunity. The district court denied the motion. Petitioners took an appeal from that denial. *Id.*, at 708–09.

The Ninth Circuit affirmed. It held that the Fourth Amendment claim presented factual issues which could not be resolved on a Rule 12(b)(6) motion. *Id.*, at 710–11.

In analyzing the Fourteenth Amendment claim, the Ninth Circuit focused on this Court's holding in *DeShaney* v. *Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). The Ninth Circuit interpreted *DeShaney* to impose § 1983 liability if a state actor enhances the danger a plaintiff faces and then acts in deliberate indifference to the plaintiff's safety. *Penilla, supra*, 115 F.3d, at 709–10. The Ninth Circuit held that Petitioners are potentially liable under this theory, because they:

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[3] It is entirely unclear how Petitioners, having broken the door lock on their way in, managed to lock it on the way out.

" . . . clearly placed Penilla in a more dangerous position than the one in which they found him. . . . [B]y cancelling the 911 call, removing Penilla from public view, and locking the front door, the officers made it impossible for anyone to provide emergency medical care to Penilla." *Id.*, at 710.

Petitioners timely filed a petition for rehearing and suggestion for hearing *en banc*, which the Ninth Circuit denied and rejected.

Reasons for Granting Certiorari

I. This Court Should Settle Whether There Is a "Danger Enhancement" Exception to the Rule That States Have No Duty, Under the Due Process Clause, to Protect Citizens From Private Harm.

A. *Lower Courts Are Split on This Question.*

It has been nearly a decade since this Court decided *DeShaney* v. *Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). The Court granted certiorari in *DeShaney*

" . . . [b]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, and the importance of the issue to the administration of state and local governments . . . ." *Id.*, at 194 (citation omitted).

While *DeShaney* has cleared up some inconsistency among the lower courts, considerable inconsistency remains. Petitioners respectfully submit that it is time for the Court to revisit this topic.

In *DeShaney*, the Court held that the Due Process Clause does not require the states to protect citizens from private harm. *DeShaney* recognizes an exception for citizens in state custody.

Lower courts have divided over the existence of a second exception. This division arises from the italicized phrase in the following sentence from *DeShaney*, 489 U.S. at 201:

> "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, *nor did it do anything to render him any more vulnerable to them*." (Emphasis added.)

The Eighth Circuit has interpreted the foregoing sentence as follows:

> "We cannot agree with those who have suggested that one comment toward the end of the *DeShaney* opinion—'nor did [the State] do anything to render him any more vulnerable to [the risk of private violence]'—signals the Supreme Court's approval of § 1983 liability whenever a state actor has increased the risk of harm from private sources. Such a ruling would make § 1983 virtually coterminous with traditional tort law, the very expansion of constitutional tort liability that the Supreme Court has rejected in *Martinez*, *DeShaney*, *Collins*, and *Daniels* v. *Williams*." *Dorothy J.* v. *Little Rock Sch. Dist.*, 7 F.3d 729, 734 (CA8 1993) (citations omitted).

Other courts have reached the opposite conclusion. In the instant case, the Ninth Circuit attached a different significance to the *DeShaney* sentence:

> "The Court in *DeShaney* did not focus upon custody, but rather upon the role that the state played in creating or enhancing the danger the victim faced. There, the Court reasoned that '[w]hile the State may have been aware of the dangers that [the victim] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.' [¶] We have interpreted *DeShaney* to mean that if affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under § 1983. . . ." *Penilla, supra*, 115 F.3d, at 710 (citation omitted).

As a result, lower courts are continuing in the wake of *DeShaney* to reach disparate results in similar factual situations. This is seen by contrasting Ninth Circuit precedents with decisions from other jurisdictions:

- In *Wood* v. *Ostrander*, 879 F.2d 583 (CA 1989), cert. denied, 498 U.S. 938 (1990), a policeman arrested a drunk driver, stranding his female passenger five miles from home at 2:30 a.m. in a known crime area. She accepted a ride home from a stranger who raped her. The Ninth Circuit held that the policeman had violated her Due Process rights. Yet the Tenth Circuit and Maine Supreme Court have both failed to find any constitutional violation on virtually identical facts. See *Hilliard* v. *City and County of Denver*, 930 F.2d 1516 (CA10), cert. denied, 502 U.S. 1013 (1991); *Moore* v. *City of Lewiston*, 596 A.2d 612, 613, 616–17 (Me. 1991).

- In *L.W.* v. *Grubbs*, 974 F.2d 119 (CA9 1992), cert. denied, 508 U.S. 951 (1993), prison officials selected an inmate to work alone with a female employee even though they knew he had an incurable propensity for violence against women. The inmate raped and kidnaped her. The Ninth Circuit held that the prison officials had violated her Due Process rights. Yet the Sixth, Eighth and Tenth Circuits, as well as the Colorado Supreme Court, have all found no constitutional violation in highly similar factual situations. See *Nobles* v. *Brown*, 985 F.2d 235 (CA6 1992); *Davis* v. *Fulton County, Ark.*, 90 F.3d 1346 (CA8 1996); *Liebson* v. *New Mexico Corrections Dept.*, 73 F.3d 274 (CA10 1996); *Henderson* v. *Gunther*, 931 F.2d 1150 (Colo.1997).

Even when courts agree on the existence of a "danger enhancement" exception to *DeShaney*, they disagree on how to apply it. In *Kneipp* v. *Tedder*, 95 F.3d 1199 (CA3 1996), the court held that police officers violated an incapacitated citizen's Due Process rights by *leaving her outdoors* rather than escorting her one-third block into her home, when her own voluntary inebriation subsequently caused her to injure herself by falling down an embankment. In contrast, the Ninth Circuit held in the instant case that police officers violated a citizen's Due Process rights by *doing precisely the opposite*, *i.e.*, escorting him into his home rather than leaving him outdoors. This in turn conflicts with the Ninth Circuit's own holding in *Wood*, *supra*, 879 F.2d 583, which found a Due Process violation where a police officer left a woman outdoors rather than escort her home.

The Ninth Circuit's decision in the instant case creates an additional split of authority. Other circuits refuse to impose "danger enhancement" liability when a public safety officer acts in response to a reported emergency. See, *e.g.*, *Bradberry* v. *Pinellas County*, 789 F.2d 1513, 1518 (CA11 1985) (even where a lifeguard's failed rescue attempt heightens a drowning man's peril, there is no constitutional due process deprivation); *Wideman* v. *Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1037 (CA11 1987) (distinguishing between situations where the state actively places someone in danger and situations where the state heightens the peril of someone already exposed to risk); *Harris* v. *District of Columbia*, 932 F.2d 10, 14–15, 289 U.S.App.D.C. 357 (1991) (implicitly recognizing this distinction on facts analogous to those of the instant case).

The First Circuit recently noted the chaotic state of this area of the law:

> " . . . [W]e cannot extract a clearly established right from a somewhat confusing body of caselaw . . . . The history of the state-created danger theory, although recently comprehensively described by the Third Circuit in *Kneipp*, is an uneven one. The distinction between affirmatively rendering citizens more vulnerable to harm and simply failing to protect them has been blurred. Moreover, courts have sometimes found that a given action, while rendering the plaintiff more vulnerable to danger, did not amount to a constitutional violation, but instead should be viewed as a state law tort." *Soto* v. *Flores*, 103 F.3d 1056, 1065 (CA1 1997) (citations omitted); see also *Moore*, *supra*, 596 A.2d, at 617, n. 12 (recognizing split in authority).

Petitioners urge this Court to grant certiorari to provide guidance on whether there is a "danger enhancement" exception to *DeShaney*, and, if so, how it applies.

B. *Unless Overturned, the Ninth Circuit Rule Will Discourage Public Employees From Providing Highly Beneficial Emergency Rescue Services.*

There is a common thread among the decisions which have found a "danger enhancement" exception to the *DeShaney* rule: They construe the Due Process Clause as though it were an insurance policy. Most such decisions share the following elements:

- The plaintiff was already exposed to some danger before the state actor's arrival (*e.g.*, being chauffeured by a drunk driver as in *Wood*, or being physically incapacitated as in the instant case);

- The state actor engaged in the lawful discharge of a societally beneficial activity (*e.g.*, arresting a drunk driver as in *Wood*, or responding to a "911" call as in the instant case);

- The state actor did not inflict the plaintiff's injury;

- The injury occurred after the state actor had departed;

- The state actor did not intend for the plaintiff to suffer any injury;

- The state actor's conduct at most created a possibility of injury, rather than a certainty of injury;

- The jury must engage in *post hoc* speculation as to whether the state actor's conduct actually enhanced the plaintiff's preexisting danger (*e.g.*, whether the *Wood* plaintiff was safer as a drunk driver's passenger than as a pedestrian in a crime area, or whether an incapacitated citizen is better off outdoors than indoors);
- The plaintiff's injury was either self-inflicted (*e.g.*, falling off an embankment due to voluntary intoxication as in *Kneipp*) or inflicted by a criminal who later happened onto the scene (*e.g.*, the rapist in *Wood*); and
- The state actor is held vicariously liable for a criminal's illegal act (as in *Wood*) or the plaintiff's own recklessness (as in *Kneipp*).

Under the "danger enhancement" theory, then, public employees become involuntary insurers of private citizens they encounter.

Victims of tragedy often elicit sympathy. Perhaps that is why some courts view the Due Process Clause as an insurance policy that guarantees compensation to citizens who suffer misfortune.

Such insurance comes with a high premium, though. The potential for liability gives public employees a strong incentive to refrain from socially beneficial activities.

Indeed, the mere possibility of exposure to federal litigation might deter many public employees from undertaking rescues and providing other worthwhile services. That is because "danger enhancement" cases are easy to plead, even when unwarranted by the facts. All a plaintiff need do is allege that public employees somehow enhanced the risk of a misfortune he suffered.

While easy to plead, "danger enhancement" cases are difficult and costly to defend. Even though such suits frequently prove meritless, they expose public employees to the costs of trial and burdens of broadranging discovery. Those costs are beyond the means of many, if not most, public employees.

There is only one way a public employee can be sure of avoiding such litigation exposure: He must refrain from contact with private citizens who are in danger. In short, public employees would undoubtedly hesitate to undertake citizen rescues if they were exposed to federal litigation every time they did so.

For this reason, courts outside the Ninth Circuit recognize the danger of imposing constitutional liability in this area. See, *e.g.*, *Archie* v. *City of Racine*, 847 F.2d 1211, 1218, 1224 (CA7 1987) (*en banc*), cert. denied, 489 U.S. 1065 (1989); see also *id.*, at 1227 (POSNER, J., concurring); *Hamilton by and Through Hamilton* v. *Cannon*, 80 F.3d 1525, 1532 (CA11 1996) (doubting that the Constitution requires a rule of law under which some rescue effort is worse than none from the rescuer's perspective). The District of Columbia Circuit expressed its trepidation thusly in *Harris*, *supra*, 932 F.2d, at 15 (footnote omitted):

> " . . . [I]t is rather difficult to envision how policemen, ambulance drivers, or other government employees would behave if constitutional liability were to attach to efforts to help those who were injured or incapacitated. . . ."

Imposing "danger enhancement" liability on public employees would thus discourage them from providing assistance in emergency situations. This would be truly unfortunate, since government emergency rescue services are highly beneficial to society. The reduction or elimination of such services would be particularly detrimental to the poor, who cannot afford private emergency medical treatment.

The Ninth Circuit "danger enhancement" rule might well benefit the bank accounts of Penilla's survivors in the instant case. Yet that benefit will come at the expense of the lives of the future Penillas of the world, who may find themselves without government rescue services in their hour of need. See *Archie*, *supra*, 847 F.2d, at 1224 (*en banc*); see also *id.*, at 1227 (POSNER, J., concurring).

The Court should grant certiorari to address this important question of federal law.

C. *The Ninth Circuit's Rule Conflicts With Modern Decisions From This Court Stressing the Importance of Federalism.*

Of course, a state could rationally *choose* to give a tort victim some compensation in this circumstance. Principles of federalism, however, militate against *requiring* states to do so.

The doctrine of federalism has been a recurring theme in this Court's modern decisions. A prime example is the closing passage from *DeShaney*, *supra*, 489 U.S., at 203:

> "The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment."

The Seventh Circuit sitting *en banc* has concluded that principles of federalism should apply with particular force where emergency rescue services are concerned. See *Archie*, *supra*, 847 F.2d, at 1223–24. The Seventh Circuit's rationale may be paraphrased as follows:

A city offering emergency rescue services must make choices. Increasing the quality of rescue services may mean increasing taxes and/or decreasing the budget for crime prevention and other public services. To maximize the availability of rescue services while minimizing the corresponding impact on taxes and other municipal services, a state may choose to limit the tort remedy for rescue service delicts, thereby ensuring that tort litigation costs do not consume more revenues than a city is willing to devote to rescue services. *Id.*, at 1223–24.

Federal courts should respect the popular will in jurisdictions which restrict tort liability in an effort to maximize the availability of cost-effective rescue services. Victims of rescue service delicts should be limited to the remedies which their state provides in its own court system. *Id.*, at 1224.

Petitioners respectfully urge the Court to grant certiorari, because the Ninth Circuit's "danger enhancement" rule stands in conflict with this Court's decisions regarding the importance of federalism.

D. *The Ninth Circuit's Rule Conflicts With This Court's Reluctance to Expand the Concept of Substantive Due Process.*

The Ninth Circuit approach also conflicts with this Court's decisions construing the Due Process Clause. This Court has *never* recognized a "danger enhancement" exception to the rule that states have no Due Process duty to protect citizens from private harm.

If anything, the Court has indicated that the Due Process Clause should be construed more narrowly. As the Court cautioned in *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992) (with citations omitted):

> "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . ."

The absence of "guideposts for responsible decisionmaking" is nowhere more evident than in "danger enhancement" litigation. In the eight years since *DeShaney*, there has been tremendous inconsistency among lower court decisions in "danger enhancement" cases. See this Pet., at 6–9, *ante*. The lower courts' inability to achieve consensus counsels against expanding the concept of substantive due process into this realm.

II. THIS COURT SHOULD ADDRESS WHETHER THE FOURTH AMENDMENT REQUIRES PUBLIC SAFETY OFFICERS WHO RESPOND TO A "911" CALL TO OBTAIN A WARRANT BEFORE HELPING A DISABLED CITIZEN INTO HIS HOME.

In the instant case, the Ninth Circuit also held that Petitioners may have violated Penilla's Fourth Amendment rights by breaking the lock on his front door and moving him into his home. *Penilla*, *supra*, 115 F.3d, at 710–11.

With the utmost of respect, Petitioners submit that the Ninth Circuit has lost sight of the Fourth Amendment's origin and purpose. The Fourth Amendment was adopted to ensure that police do not randomly snatch citizens from within the privacy of their homes. It was not intended to preclude police from helping a disabled individual *into* his home.

There is no allegation that Petitioners entered Penilla's home with the intention of searching it, arresting someone, or seizing something. They merely responded to a "911" report that a man had collapsed *while trying to enter his home through the front door*. In other words, Petitioners simply helped Penilla accomplish what he himself had been trying to do only minutes earlier when he collapsed.

Other courts have failed to find any Fourth Amendment violation under similar circumstances. See, *e.g.*, *State* v. *Lynd*, 54 Wash.App. 18, 771 P.2d 770 (1989) (no Fourth Amendment violation where officer entered residence in response to "911" call); *Gallmeyer* v. *State*, 640 P.2d 837 (Alaska App.1982) (no Fourth Amendment violation where officer made unconsented warrantless entry into residence to give aid to infant on front porch).

Petitioners respectfully urge this Court to grant certiorari and address whether the Fourth Amendment requires public safety officers who respond to a "911" call to obtain a warrant before helping a disabled citizen into his home.

CONCLUSION

For all of the foregoing reasons, this Petition should be granted.

DATED: October 14, 1997

Respectfully submitted,

STEVEN N. SKOLNIK
Counsel of Record for Petitioners
JOSEPH SETTLES and IOANE TUA

APPENDIX

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA PENILLA, MICHAEL PENILLA; JUAN PENILLA, by and through Maria Penilla administratrix estate,
Plaintiffs-Appellees,

v.

CITY OF HUNTINGTON PARK,
Defendant,

and

JOSEPH SETTLES; IOANE TUA,
Defendants-Appellants.

No. 95-56254

D.C. No. CV-95-03237-RAP

OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted
January 10, 1997—Pasadena, California

Filed June 6, 1997

Before: Betty B. Fletcher and Stephen S. Trott, Circuit Judges, and Bruce S. Jenkins,* District Judge.

Per Curiam Opinion

*Honorable Bruce S. Jenkins, Senior United States District Judge for the District of Utah, sitting by designation.

COUNSEL

Steven N. Skolnick, Santa Monica, California, for the defendants-appellants.

Danilo J. Becerra, Moreno, Becerra & Guerrero, Montebello, California, for the plaintiffs-appellees.

OPINION

PER CURIAM:

In the late morning of May 15, 1994 Juan Penilla ("Penilla") was on the porch of his home in Huntington Park, California.[1] He became seriously ill. His neighbors and a passerby called 911 for emergency medical services, and attempted to assist Penilla until emergency services arrived. Huntington Park Police Officers Settles and Tua arrived first. The officers examined Penilla, found him to be in grave need of medical care, cancelled the request for paramedics, broke the lock and door jam on the front door of Penilla's residence, moved him inside the house, locked the door, and left at approximately 11:30 a.m. The next day, family members found Penilla dead on the floor inside the house. He died as a result of respiratory failure.

One year later, Maria Penilla, the decedent's mother, Michael Penilla, the decedent's brother, and decedent's estate brought an action against the City of Huntington Park, its police department, its chief of police, and officers Settles and Tua ("the officers") alleging violations of 42 U.S.C. § 1983 and pendent state tort claims.[2] Officers Settles and Tua appeal the district court's denial of their Fed. R. Civ. P. Rule 12(b)(6) motion for dismissal on the basis of qualified immunity.

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[1]This appeal arises from the district court's denial of appellants' 12(b)(6) motion to dismiss. Accordingly, we take as true the facts alleged in the appellees' complaint, although they are only allegations at this stage.

[2]The district court granted the motion to dismiss the claims of Michael Penilla because the Ninth Circuit has rejected a cognizable liberty interest in sibling companionship. *See Ward v. City of San Jose*, 967 F.2d 280, 283-284 (9th Cir. 1982). This decision is not at issue in this appeal.

Because immunity is an entitlement to immunity from suit, rather than a defense to liability, its denial is immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

We review a district court's decision on qualified immunity in a 42 U.S.C. § 1983 action de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The Supreme Court's grant of appellate jurisdiction under *Mitchell* is narrow. Because the officers have moved for qualified immunity on a motion to dismiss, we decide only whether defendants' alleged conduct violated clearly established constitutional rights. *Todd v. United States*, 849 F.2d 365, 369 (9th Cir. 1988). Thus, following *Mitchell* and *Todd* we confine our review to the qualified immunity issue.

In order to be entitled to qualified immunity, the officers must show that their discretionary conduct did not violate any clearly established rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A public official is not entitled to qualified immunity when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994).

On appeal we do not determine the merits of appellees' claim that the officers' conduct actually violated clearly established statutory or consitutional rights. *Mitchell*, 472 U.S. at 528-29. "All [we] need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . ." *Id.* at 528. The officers are entitled to dismissal on the basis of qualified immunity only if, viewing the facts in the light most favorable to appellees, the facts as alleged do not support a claim that they violated clearly established law. *Id.* at 528, n.9.

The officers argue that they are entitled to qualified immunity because there is no clearly established constitutional right to emergency medical care for persons not in custody and because there is no clearly established constitutional requirement that police officers must obtain a warrant before "helping a collapsed man off of his front porch and into his home." We disagree with their characterization of the rights involved.

I. Violation of Penilla's Fourteenth Amendment Rights

Appellees' first cause of action alleges a Fourteenth Amendment violation, the deprivation of Penilla's life without due process of law. The officers assert that they owed Penilla no constitutional duty to provide medical care and that even if they did owe him such a duty, they did not cause his death.

[1] Although the 14th Amendment does not generally require police officers to provide medical assistance to private citizens, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989) (holding that the due process clause does not generally confer affirmative rights to governmental aid, even where such aid may be necessary to secure life), when a state officer's conduct places a person in peril in deliberate indifference to their safety, that conduct creates a constitutional claim. *See L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) (concluding a valid section 1983 claim existed against a supervisor at a state facility who placed plaintiff in danger by assigning her to work with an inmate sex offender who had a history of violent assaults against women; he subsequently raped and kidnapped her); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (concluding that a valid section 1983 claim existed against a state police officer who caused a woman to be stranded in a high-crime area at night where she was subsequently raped).

Appellees do not allege that these officers attempted, but failed, to rescue Penilla, or even that they should have, but did not, attempt to rescue him. Their allegation is that the officers placed Penilla in danger in deliberate indifference to his medical needs.

The officers attempt to characterize this case as similar to situations in which § 1983 liability has been rejected for police officers' and firefighters' conduct during failed rescues or in situations where they did not affirmatively cause harm. *See, e.g., Jackson v. Byrne*, 738 F.2d 1443, 1448 (7th Cir. 1984) (firefighters not liable for death of children during firefighters' strike); *Bradberry v. Pinellas Country*, 789 F.2d 1513, 1514-15, 1518 (11th Cir. 1986) (no liability for lifeguard because "[t]he state did not kill [decedent], the ocean did.").

[2] We agree with the district court that these cases are inapposite. The officers in this case allegedly took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 911 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; they then locked the door and left him there alone. And they allegedly did so *after* they had examined him and found him to be in serious medical need.

The cause of Penilla's death is a factual issue, undeveloped on this record. The officers' alleged conduct, however, clearly placed Penilla in a more dangerous position than the one in which they found him. We agree with the district court that by cancelling the 911 call, removing Penilla from public view, and locking the front door, the officers made it impossible for anyone to provide emergency medical care to Penilla.

The officers argue that under *DeShaney*, a constitutional duty to provide care is only triggered when a person is in custody. We reject this argument. The Court in *DeShaney* did not focus upon custody, but rather upon the role that the state

played in creating or enhancing the danger the victim faced. There, the Court reasoned that "[w]hile the State may have been aware of the dangers that [the victim] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S. at 201.

[3] We have interpreted *DeShaney* to mean that if affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under § 1983. In *Grubbs* we explained:

> *DeShaney* did not rule that custody was required where the state affirmatively causes the harm. . . . *DeShaney* thus suggests that had the state created the danger, [plaintiff] might have recovered even though he was not in custody.

Grubbs, 974 F.2d at 121; *see also Wood*, 879 F.2d. at 588. The critical distinction is not, as appellants allege, an indeterminate line between danger creation and enhancement, but rather the stark one between state action and inaction in placing an individual at risk.

II. Violation of Penilla's Fourth Amendment Rights

Appellees allege that the officers violated Penilla's Fourth Amendment rights when they broke the lock on the door and entered his house without either express consent or a warrant. The district court held that whether the warrantless entry was justified on the basis of exigent circumstances was a question of fact which could not be resolved on a 12(b)(6) motion and denied the officers qualified immunity on this basis. We agree.

Appellees have alleged sufficient facts to support their allegations of unlawful intent: specifically, that the officers broke

down the door of an empty home and left Penilla there, after they had determined that he was in dire need of care. *See Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994) (requiring a heightened pleading standard for § 1983 cases where knowledge or intent is an element of the plaintiff's constitutional tort); *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994) (reversing summary judgment for defendants on Fourth Amendment claim because a genuine dispute existed as to why defendants ordered the storming of a house).

[4] The emergency aid doctrine, relied upon by the officers, allows police to enter a dwelling without a warrant only to render aid to a person whom they reasonably believe to be in distress. *See, e.g., U.S. v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (no Fourth Amendment violation where officer attempting to assist unconscious man made unconsented warrantless entry into his locked briefcase). It cannot, on its face, justify the entry made here: Penilla was outside the dwelling when the police broke down his door and moved him inside. No emergency aid was given; instead of rendering aid, the officers entered Penilla's home and thereby prevented him from receiving the aid that had already been requested by others.

III. Violation of Maria Penilla's Fourteenth Amendment Rights

The district court found that because appellants were not entitled to qualified immunity for the violation of Penilla's due process rights, Maria Penilla could pursue her own rights under the Fourteenth Amendment for deprivation of her liberty interest in her familial relationship with her son. Appellee Maria Penilla died during the pendency of this appeal. Accordingly, we do not reach the issue of what rights survive her death.

IV. Conclusion

We affirm the district court's denial of qualified immunity to the officers. Taking all material facts alleged as true, they violated clearly established rights of which a reasonable person should have known. *Harlow*, 457 U.S. at 818 (1982). The law at issue in this case was clearly established on May 15, 1994, when the alleged consitutional violation occurred. In 1992, we held that the custody of the victim is not a prerequisite for a § 1983 action brought against state actors when their affirmative actions place an individual in danger. *Grubb*, 974 F.2d at 121. Under *Grubb*, a state actor in this circuit has a constitutional duty under the due process clause to protect an individual where the state places that individual in danger through affirmative conduct. *See also Wood*, 879 F.2d 583, 589-590 (9th Cir. 1989). It is also well established that warrantless entries into private homes are *per se* unreasonable unless they fall within narrowly recognized exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347 (1967).

The district court's denial of appellants' motion to dismiss on the basis of qualified immunity is AFFIRMED.

FILED
CLERK, U.S. DISTRICT COURT
AUG 8, 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARIA PENILLA, et al.,	) CASE NO. CV 95–3237 RAP(BQRx)
Plaintiffs,	) AMENDED ORDER RE DEFENDANTS' MOTION TO DISMISS
v.	) ENTERED CLERK, U.S. DISTRICT COURT
CITY OF HUNTINGTON PARK, et al.,	) AUG 9, 1995
Defendants.	) CENTRAL DISTRICT OF CALIFORNIA BY DEPUTY

On July 24, 1995, the court heard the motion to dismiss of the City of Huntington Park, Huntington Police Department, Joseph Settles, Ioane Tua, and Randy E. Narramore (collectively "defendants"). Defendants have moved to dismiss the three § 1983 claims by plaintiffs Maria Penilla, Michael Penilla and the Estate of Juan Penilla. Although defendants concede that plaintiffs may be able to recover under various tort theories, defendants contend that plaintiffs cannot state any claim against the defendants under § 1983 and that defendant police officers are entitled to qualified immunity.

After full consideration of the moving, opposition, and reply papers, the oral arguments of counsel, and all other matters presented to the court, defendants' motion to dismiss is granted in part and denied in part. The § 1983 claims by Mr. Juan Penilla's brother, Michael Penilla, are dismissed with prejudice. Defendant's motion to dismiss is denied in all other respects.

Background

This action arises out of the death of Mr. Juan Penilla at his home. On May 15, 1994, Mr. Penilla became seriously ill while in front of his home. His neighbors tried to assist him, to no avail. They telephoned 911 and defendant police officers and paramedics were dispatched to the scene. The police officers examined Mr. Penilla, who, by that time, was unconscious.

For some unknown reason, instead of securing emergency medical attention for Mr. Penilla, the defendant officers knocked the front door down, carried him in, and laid him on the floor of his home. The police officers then left, locking the door to Mr. Penilla's home. Unfortunately, Mr. Penilla's family did not arrive until the next day. They found Mr. Penilla dead, on the floor where the officers had left him.

Analysis

A. Section 1983 Liability of Defendant Police Officers

"Section 1983 imposes liability only for violations of rights secured by the Constitution or federal law." *Jackson v. Byrne*, 738 F.2d 1443, 1445 (7th Cir. 1984).

Accordingly, the starting point in an analysis of a Section 1983 claim is the isolation of the specific federal right that plaintiff claims defendant violated when acting under color of state law." *Id.* at 1445–1446.

1. *Fourteenth Amendment*

Plaintiffs' first cause of action asserts a Fourteenth Amendment violation. Plaintiffs allege that defendant officers deprived Mr. Penilla of life without substantive due process of law. Defendants contend that plaintiffs cannot recover under § 1983 because: (1) defendants owed Mr. Penilla no constitutional duty to provide him with emergency medical services; and (2) even if defendants owed Mr. Penilla a constitutional duty, Mr. Penilla's death was not caused by defendants.

The Supreme Court has recognized that the due process clause does not generally confer "affirmative rights to governmental aid, even where such aid may be necessary to secure life, liberty, or property interest of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989). However, the court in *DeShaney* did recognize "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198.

Defendants cite various cases which have denied § 1983 liability under circumstances, arguably, analogous to this case. For example, in *Jackson v. Byrne*, 738 F.2d 1443, 1448 (7th Cir. 1984), the Seventh Circuit held that fire fighters were not liable under § 1983 for the deaths of

children caused by a fire which occurred during a firefighter strike. 738 F.2d at 1446. The *Jackson* Court concluded that the defendants had not "deprived" the children of life within the meaning of the Fourteenth Amendment because defendants had not caused the fire. *Id.*[1]

Further, the *Jackson* Court held that defendants did not have a constitutional duty to act. As the Seventh Circuit explained:

> We have elsewhere stated that nothing in the Constitution requires governmental units to act when members of the general public are imperiled. . . . In our opinion, 'the Constitution is a charter of negative liberties; it tells the [government] to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. . . . Thus, when the Chicago fire fighters carried out their strike threat and left the city with a fraction of its former protective work force, they did not omit to perform a duty required of them by the Constitution. The Constitution creates no positive entitlement to fire protection. . . . The firefighters may have violated state law forbidden work stoppages by essential civil servants and could very well be liable to plaintiffs under principles of state tort law.

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[1] The *Jackson* Court however did note that the result would be different had the "government officials set the fire or placed forces in motion which ignited the fire that claimed the lives of the . . . children." 738 F.2d at 1446.

> Nonetheless, the fire fighters, standing under no constitutional duty to act, did not effect a deprivation within the meaning of the Fourteenth Amendment.

Id.[2] *See also Pinder v. Johnson*, 53 F.3d 1169 (4th Cir. 1995).

If plaintiffs had simply alleged that Mr. Penilla had died as a result of defendant officers' failure to provide emergency medical services, the court would be inclined to grant defendants' motion to dismiss for failure to state a claim under § 1983. *See Bradberry v. Pinellas County*, 789 F.2d 1513, 1517 (11th Cir. 1986) ("negligent or grossly negligent failure to rescue a person already in danger, without more, does not amount to a constitutional deprivation"). However, the issue presented in this case is a more difficult one: whether an individual's substantive due process rights are triggered when the state's affirmative conduct creates or enhances a danger.

Here, plaintiffs contend the defendant officers' affirmative conduct deprived Mr. Penilla of life without due process of law. Plaintiffs allege that defendant officers, in responding to a 911 call from Mr. Penilla's neighbors, carried an unconscious Mr. Penilla inside his house, laid him on the floor, locked the front door, and called off the paramedics. It is this alleged affirmative conduct which plaintiffs contend forms the basis of their § 1983 claims against the defendants.

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[2] The Seventh Circuit in *Jackson* did recognize that a constitutional deprivation exists where "the state deprive[s] a person of life either by directly inflicting harm on him or by preventing others from rescuing him." 738 F.2d at 1448.

Although it appears that Mr. Penilla's illness was not caused by defendants, the officers' affirmative conduct, arguably, placed Mr. Penilla in a more dangerous situation than the one in which they found him. By removing Mr. Penilla from public view and by locking the front door, the defendant officers made it impossible for anyone to provide emergency medical care to Mr. Penilla. Because the defendants may have increased the risk that Mr. Penilla would die from his illness, defendants' affirmative conduct triggered a constitutional duty. Under these circumstances, the court concludes that plaintiffs have alleged sufficient facts to state a § 1983 claim against defendant officers.

Defendants respond that, under *DeShaney*, a constitutional duty can only be triggered if Mr. Penilla was in custody. The language in *Deshaney*, however, does not require that Mr. Penilla be in custody in order for a constitutional duty to be triggered. The Supreme Court in *DeShaney* focused not only upon the custody issue but also upon the role that the state played in creating or enhancing the danger the victim in *DeShaney* faced. In *DeShaney*, a child had been severely beaten by his father after the social workers ignored complaints that the child was being abused by his father and after the social workers failed to remove the child from the father's custody.

In reaching its holding, the *DeShaney* Court reasoned as follows. First, the harm to the child in *DeShaney* did not occur while he was in the State's custody. 489 U.S. at 201. Second, although the state was aware of the dangers that the child faced, the state "played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* And third, the state's return of the child to his father, after the state had temporary custody of the child, placed the child "in no worse position than that in which he would have been had it [the state] not acted at all." *Id.*

The Ninth Circuit has interpreted this language in *DeShaney* as creating two exceptions to the general rule that individuals do not have a constitutional right to be protected by the state from harm. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1982), *cert. denied*, 113 S.Ct. 2442 (1993). The two exceptions are: "(1) the 'special relationship' exception; and (2) the 'danger exception.'" *Id.*

Noting that the cases blend the two exceptions, the *Grubbs* Court explained that the two exceptions are, in fact, different:

> *DeShaney* did not rule that custody was required where the state affirmatively causes the harm. . . . *DeShaney* thus suggests that had the state created the danger, [plaintiff] Joshua might have recovered even though he was not in custody.

Id. at 121. A "special relationship" usually exists where the person is in custody or involuntarily hospitalized. By contrast, the "danger" exception "necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *Id.*

Therefore, in the Ninth Circuit, state actors have a constitutional duty to protect an individual from harm if the state actors' affirmative conduct creates or enhances a dangerous situation or renders an individual more vulnerable to an existing danger. By alleging that the defendant police officers in this case took affirmative steps which put Mr. Penilla in increased risk of death, plaintiffs are relying on the "danger" exception under *Grubb* to state a § 1983 claim against defendant officers.

2. *The Fourth Amendment*

Plaintiffs allege that the defendant officers also deprived Mr. Penilla of his Fourth Amendment rights when they broke the lock on the door and entered Mr. Penilla's home without express consent or without a warrant. Defendants contend that the officers' warrantless entry into Mr. Penilla's home was justified given that Mr. Penilla was seriously ill. Whether an exception to the warrant requirement applies is a question of fact which cannot be resolved on a 12(b)(6) motion.

B. Qualified Immunity of Defendant Police Officers

In order for the defendant officers to be entitled to qualified immunity, the defendants must show that their discretionary conduct did not violate any clearly established rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The Ninth Circuit has held that "[q]ualified immunity from suit must be granted when the law allegedly violated is not clearly established." *Conner v. City of Santa Ana*, 897 F.2d 1482, 1087 (9th Cir. 1990), *cert. denied*, 498 U.F. 816, 111 S.Ct. 59. "Although a plaintiff must do more than offer conclusory allegations that the defendant violated a clearly established right, a public official is not entitled to qualified immunity when '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Allen v. Sakai*, 48 F.3d 1082, 1097 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 1695 (citations omitted).

There is no doubt that the law at issue in this case was clearly established on May 15, 1994, the date when the alleged constitutional violation occurred. As discussed above, the Ninth Circuit in 1992 held that the custody of the victim is not a prerequisite for a § 1983 action brought against state actors for their failure to protect an individual who is in danger. 974 F.2d at 121. Under *Grubb*, a state actor in this circuit has a constitutional duty under the due process clause to protect an individual, where the state, through affirmative conduct, creates or enhances a danger. *See Wood v. Ostrander*, 879 F.2d 583, 589–590 (9th Cir. 1989). Therefore, the court concludes that defendant officers are not entitled to qualified immunity on the grounds that there is no clearly established law.

C. § 1983 Liability of Department and City

Having concluded that plaintiffs can state a claim under § 1983 against defendant officers and that defendants are not entitled to qualified immunity at this early stage of the proceedings, the court also concludes that plaintiffs can state a § 1983 claim against the City and the Department based on a *Monnell* theory. Plaintiffs have alleged in their second cause of action that the alleged constitutional violation occurred pursuant to a city policy, regulation or custom. This allegation is sufficient to survive a 12(b)(6) motion.

D. Familial Relationship under the Fourteenth Amendment

Plaintiffs allege that they have been deprived of their liberty interest in their familial relationship with Mr. Penilla and that this deprivation violated the Fourteenth Amendment.

Having concluded that plaintiffs have stated a claim under § 1983 for the violation of Mr. Penilla's due process rights, the court also concludes that Mr. Penilla's mother, Maria Penilla, can pursue her own rights under the Fourteenth Amendment for the violation of her substantive due process rights. *See Crumpton v. Gates*, 947 F.2d 1418, 1420–1421 (9th Cir. 1991).

However, the Ninth Circuit has rejected a cognizable liberty interest in sibling companionship. *See Ward v. City of San Jose*, 967 F.2d 280, 283–284 (9th Cir. 1982). Accordingly, Michael Penilla's § 1983 claims against defendants are dismissed with prejudice.

E. Pendent State Law Claims

Because plaintiffs have stated claims under § 1983, the court has subject matter jurisdiction over this action. Pursuant to 28 U.S.C. § 1367, the court exercises pendent jurisdiction over plaintiffs' state law claims.

Conclusion

As set forth above, defendants' motion to dismiss plaintiffs' § 1983 claims is denied in all respects, except that plaintiff Michael Penilla's § 1983 claims are dismissed with prejudice.

IT IS SO ORDERED.

DATED: August 8, 1995

/s/
Richard A. Paez
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA PENILLA, MICHAEL PENILLA; JUAN PENILLA, by and through Maria Penilla administratrix estate, Plaintiffs-Appellees, v. CITY OF HUNTINGTON PARK, Defendant, and JOSEPH SETTLES; IOANE TUA, Defendants-Appellants.	FILED JUL 18 1997 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS No. 95–56254 D.C. No. CB 95–3237 RAP ORDER

Before: FLETCHER and TROTT, Circuit Judges, and JENKINS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Trott have voted to reject the suggestion for rehearing en banc and Judge Jenkins recommends rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Bruce S. Jenkins, Senior United States District Judge for the District of Utah, sitting by designation.

(2)

Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

No. 97-664

In The

Supreme Court of the United States

October Term, 1997

JOSEPH SETTLES and IOANE TUA,

Petitioners,

vs.

MICHAEL PENILLA, Administrator of the Estate of Juan Penilla, Deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to determine whether the "danger enhancement" rule of *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189 applies to law enforcement officers responding to a "911 call" where they find a person in serious need of medical care and unconscious and then proceed to cancel the request for paramedics that had been made by bystanders who were rendering aid and then proceed to drag the unconscious person into his empty home and lock him behind closed doors thus rendering aid to him impossible.

2. Should the Court grant certiorari to determine whether police officers violated a person's Fourth Amendment rights against unreasonable search and seizure where the Officers in responding to a "911 call" find a person in serious need of medical care and unconscious outside of his home who then proceed to cancel the request for paramedics that had been made by bystanders who were rendering aid and then proceed to forcibly break into the person's empty home and drag him into it and leave the person behind locked closed doors unable to receive any medical care or further bystander assistance.

LIST OF PARTIES

1. Joseph Settle;

2. Ioane Tua;

3. Michael Penilla, as the administrator of the Estate of Maria Penilla, now deceased;

4. Michael Penilla, who has succeeded Maria Penilla as administrator of the Estate of Juan Penilla, deceased.

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STATEMENT OF THE CASE

This is a civil rights case. Its genesis was the 1994 death of Juan Penilla ("Penilla"). Petitioners are two police officers who responded to a "911 call" and found Penilla in serious medical need outside his empty home being assisted by a neighbor and passerby. The officers canceled the "911" request for paramedics then proceeded to force entry into the home and dragged Penilla inside the empty house and left him behind the locked door where he was found the next day dead from respiratory failure. *Penilla v. Huntington Park*, 115 F.3d 707 (1997).

Petitioners consistently throughout the proceedings below and to this Court have attempted to characterize the Penillas' allegations as a claim that police officers have a duty to provide emergency medical care to a person when they find him in serious need of medical care. Both the district court and the Ninth Circuit found that the officers in this case took actions that significantly increased the risk facing Penilla: they canceled the 911 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; they then locked the door; and left him there alone and they did so *after* they had examined him and found him to be in serious medical need. *Penilla v. Huntington Park*, 115 F.3d 707, 710 (1997).

Both the district court and the Ninth Circuit agreed that the officers' conduct made it impossible for anyone to provide emergency medical care to Penilla. *Penilla v. Huntington Park*, 115 F.3d 707 (1997).

STATEMENT OF JURISDICTION

Penilla's Estate and Maria Penilla sued Petitioners in the district court. Of the seven counts which make up the complaint,

the Petitioners address only two in this Petition. The first which is made by Mr. Penilla's estate, under 42 U.S.C. § 1983 alleges that the officers' affirmative conduct deprived Penilla of his right to life without due process of law in violation of the Fourteenth Amendment.

It is also alleged that the officers violated Penilla's Fourth Amendment rights against unreasonable search and seizure by breaking into his home knowing he was in serious need of medical care, dragging him inside and then leaving him locked inside preventing him from receiving any help.

The second claim is for the violation of Maria Penilla's own rights under the Fourteenth Amendment for a deprivation of her liberty interest in her familial relationship with her son, decedent Penilla.[1]

REASONS FOR DENYING THE WRIT

I.

THE LAW IS WELL SETTLED THAT IF AFFIRMATIVE CONDUCT ON THE PART OF A STATE ACTOR PLACES A PLAINTIFF IN DANGER AND THE OFFICERS' ACT IN DELIBERATE INDIFFERENCE TO THAT PLAINTIFF'S SAFETY A CLAIM ARISES UNDER § 1983.

This Court has recognized that the due process clause does not generally confer "affirmative rights to governmental aid, even where such aid may be necessary to secure life, liberty, or

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1. Maria Penilla died during the pending of the appeal before the Ninth Circuit and her estate was substituted into the action. The Ninth Circuit did not reach the issue of what rights survived her death. *Penilla v. Huntington Park*, 115 F. 3d 707, 710 (1997).

property interest of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989). However, the Court in *DeShaney* did recognize "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198.

Petitioners cite various cases which have denied § 1983 liability under circumstances, arguably, analogous to this case. For example, in *Archie v. City of Racine*, 847 F.2d 1211 (CA 7 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989), the Seventh Circuit held that fire department dispatchers were not liable under § 1983 for the death of a woman caused by an alleged failure of dispatchers to dispatch rescue services to a woman who subsequently died. The *Racine* court concluded that the defendants had not "deprived" the woman of life within the meaning of the Fourteenth Amendment. *Archie v. City of Racine*, 847 F.2d 1211 at 1223, (CA 7 1987) (en banc).

The issue presented in Penilla's case is whether an individual's substantive due process rights are triggered when the state's affirmative conduct creates or enhances a danger.

Here, Penilla contends the Petitioners' affirmative conduct deprived Mr. Penilla of life without due process of law. Penilla alleges that Petitioners, in responding to a "911" call from Mr. Penilla's neighbors, carried an unconscious Mr. Penilla inside his house, laid him on the floor, locked the front door, and called off the paramedics. It is this alleged affirmative conduct which Penillas contend forms the basis of their § 1983 claims against the defendants.

Although Penilla's illness was not caused by Petitioner's affirmative conduct, it placed Mr. Penilla in a more dangerous

situation than the one in which they found him. By removing Mr. Penilla from public view and by locking the front door, the Petitioners made it impossible for anyone to provide emergency medical care to Mr. Penilla. Because the Petitioners increased the risk that Mr. Penilla would die from his illness, Petitioners' affirmative conduct triggered a constitutional duty. These allegations were found sufficient by both the district court and the Ninth Circuit to conclude that Plaintiff had alleged sufficient facts to state a § 1983 claim against Petitioners.

Petitioners incorrectly contend that under *DeShaney*, a constitutional duty can only be triggered if Mr. Penilla was in custody. The language in *DeShaney*, however, does not require that Mr. Penilla be in custody in order for a constitutional duty to be triggered. This Court in *DeShaney* focused not only upon the custody issue but also upon the role that the state played in creating or enhancing the danger the victim in *DeShaney* faced. In *DeShaney*, a child had been severely beaten by his father after the social workers ignored complaints that the child was being abused by his father and after the social workers failed to remove the child from the father's custody.

In reaching its holding, the *DeShaney* Court reasoned as follows. First, the harm to the child in *DeShaney* did not occur while he was in the state's custody. 489 U.S. at 201. Second, although the state was aware of the dangers that the child faced, the state "played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* And third, the state's return of the child to his father, after the state had temporary custody of the child, placed the child "in no worse position than that in which he would have been had it [the state] not acted at all." *Id.*

As the district court and the Ninth Circuit rightly concluded this is not a matter of simple allegations that the state failed to

provide medical attention. The Penillas summarized the basis for their allegations of due process violations as follows: Petitioners affirmatively placed Mr. Penilla in a position of danger, and committed themselves to the protection of Mr. Penilla by undertaking affirmative acts which contributed to his danger and risk of harm and injury.

Ninth Circuit precedent in this area establishes that the Penillas have a viable claim against Petitioners. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113 S. Ct. 2442 (1993). In *Grubbs*, the Ninth Circuit concluded that state custody was not a prerequisite to a due process claim. *Grubbs*, 974 F.2d at 120. Petitioners' authorities from other circuits are not controlling and unpersuasive. The Circuit further confirmed that under the "danger creation" exception, where state employees create a danger or increase the risk of an existing danger, a constitutional right to protection arises. *See generally*, *Id.* at 121.

As recited above, the Penillas rely on more than allegations of a denial of medical care. They amply plead a startling set of facts that supports their ultimate contention that Mr. Penilla's plight was significantly worsened by the conduct of the Petitioners.

Petitioners attempted to distinguish *Grubbs* from the present case on the shallow grounds that they did not create the danger which Mr. Penilla faced. Their attempt is unconvincing and not supported by the authority upon which *Grubbs* is based.

In *Grubbs*, the plaintiff was a woman who was assaulted, battered, kidnapped and raped by an inmate/sex offender from the custodial institution where plaintiff worked. *Id.* at 120. The court permitted her to proceed with her due process claim against her supervisors who knew that the inmate would very likely commit a violent crime if left with a woman. *Id.*

The court also noted that the allegations that the supervisor *enhanced* the plaintiff's vulnerability to the danger supported a finding of liability under § 1983. *Id.* at 121-122.

Likewise, in *Wood v. Ostrander*, 879 F.2d 483 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990), where the court settled and established the "danger creation" exception as controlling law in the Ninth Circuit, the court relied on its prior distinction of a scenario where police officers did not cause the injury and where such officers "create or *exacerbate the danger*." *Id.* at 594 (emphasis added).

As indicated by the above authority, it was well-settled in the Ninth Circuit that where a state employee's conduct enhances or exacerbates the risk or danger a person finds himself or herself in, a constitutional duty to provide protection arises.

This right being clearly established when the Petitioners intervened to worsen Mr. Penilla's plight, they are not shielded from liability by qualified immunity.

II.

THE LAW IN OTHER CIRCUITS IS IN ACCORD WITH THE POSITION OF THE NINTH CIRCUIT THAT WHERE STATE ACTION ENHANCES THE DANGER TO PLAINTIFF THE DUE PROCESS CLAUSE IS TRIGGERED BY THE OFFICERS' AFFIRMATIVE CONDUCT.

The law in other circuits is in accord with this position. For example, in *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987), the court stated:

> [A] constitutional duty can arise only when a state or municipality, by exercising significant custody or control over an individual, places that person in a worse situation than he would have been had the government not acted at all. Such a situation could arise by virtue of the state affirmatively placing an individual in a position of danger effectively stripping a person of her ability to defend herself, *or cutting off potential sources of private aid.*

Even the authority which Petitioners rely upon compels the conclusion that they are to be held constitutionally accountable under the facts alleged by the Penillas. For example, the court in *Archie v. City of Racine*, 847 F. 2d 1211, 1223 (7th Cir. 1987) (*en banc*), concluded that in circumstances such as those alleged by the Penillas, a duty to protect arises. The court stated:

> When the state puts a person in danger, the due process clause requires the state to protect him to the extent of ameliorating the incremental risk. *When a state cuts off sources of private aide, it must provide replacement protection.*

Id.

The dispatcher in *Archie* refused to dispatch aid to the plaintiff, and the court notes that this act did not make worse the plaintiff's plight, she was not prevented from calling others or from otherwise receiving assistance. *Archie* at 1223.

Unlike the acts of the dispatcher in *Archie*, the conduct of Petitioners severely exacerbated Mr. Penilla's plight and eliminated any chance he had of survival. Had they not broken through his door and dragged him inside and canceled the paramedics and emergency medical assistance which was on its

way, Mr. Penilla would have received the continued assistance of his neighbors and would have been the beneficiary of paramedic and medical attention.

Petitioners' contention that they did not kill Mr. Penilla, but rather his illness did, under the circumstances presented here, Mr. Penilla would not have died from his illness absent the conduct of Petitioners.

The case of *Rogers v. City of Port Huron*, illustrates with almost identical facts, how the application of the "danger creation" exception to the facts of the present case conclusively results in the finding that Mr. Penilla's rights to due process were violated. *Rogers v. City of Port Huron*, 833 F. Supp. 1212 (E.D. Mich. 1993).

In *Rogers*, the defendant police officers responded in the early morning hours to a call of a "man down" and found the subject of the call lying unconscious on the grassy lawn area next to the curb. *Id.* at 1214. This man was unconscious and unresponsive, smelled of liquor, breathing normally and had no signs of injury. *Id.*

The officers determined that no bystander knew the person and told them to "let him sleep it off", and that they would later check on him. *Id.* at 1215. The officers did not summon or provide medical assistance for the man as he did not appear to be in immediate danger. *Id.*

Tragically, the man was later found by bystanders in the street, with blood coming from his ear. *Id.* The man never recovered from his injuries and died as a result. *Id.*

Marshalling the facts of the case, the court concluded that the officers nonaction "did nothing to alter the danger faced by

Decedent; and the Officers did not create the danger." *Id.* at 1220-1221. The court further added that the "Officers did not intrude upon and alter the personal security of Decedent . . . [,and] the Officers' actions cannot be said to have prevented bystander help." *Id.*

The facts in the present case are significantly different and give rise to a constitutional violation. Unlike the *Rogers* subject, Mr. Penilla was found in dire need of emergency medical attention. Moreover, emergency medical assistance had been summoned and was on its way to assist Mr. Penilla.

Unlike the *Rogers* officers, who did nothing more than attempt to identify the subject, Petitioners undertook a truly alarming course of conduct. Not only did they move Mr. Penilla, they broke into his home, dragged him inside, and then locked the door behind them. In doing so, further help from bystanders was eliminated. Furthermore, the Petitioners ensured that Mr. Penilla would succumb to his illness by canceling the emergency medical attention which was in route.

The conduct of Petitioners significantly altered the danger which Mr. Penilla faced before they arrived and foreclosed bystander and emergency medical assistance. This conduct supports the Penillas' claims of due process violations.

An alternative and appropriate analysis is also available to this court for evaluating the Penillas' Fourteenth Amendment claim. A constitutionally cognizable claim under the Fourteenth Amendment exists where the state cuts off sources of private aid and does not provide replacement protection. *See Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990).

In *Ross*, the court was faced with allegations similar to the present which "[portrayed] a stunning abuse of governmental

power." *Id.* at 1424. There, a 12-year-old boy fell into Lake Michigan and a friend ran for help. *Id.* at 1424. Emergency personnel from one jurisdiction as well as bystanders responded. *Id.* Another jurisdiction, however, with authority in the area of the incident had a policy in place which limited the persons who were authorized to provide rescue services. *Id.* at 1424-25.

Based on this policy, one of this jurisdiction's police officers ordered all persons to cease their rescue efforts and positioned his boat so as to prevent the rescue attempts. *Id.* at 1425. Lamentably, as a result of the delay caused by the officers interference, the boy who had fallen into the water died. *Id.* The court concluded that "a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of lifesaving rescue without providing an alternative." *Id.* at 1432.

Because of the interference of the officer in *Ross* the rescue efforts were halted and/or made ineffective; here, because of the affirmative acts of defendants Petitioners, the efforts and measures to assist Mr. Penilla were eliminated. The conduct of the Petitioners is certainly more egregious than that of the *Ross* deputy. Petitioners physically took and secured Mr. Penilla away from the people that had attempted to help him, and they called off the professional medical assistance that was in route to attend to Mr. Penilla.

III.

THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON A CLAIM THAT THEY VIOLATED PENILLA'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WHERE THE FACTS ALLEGED THE POLICE OFFICERS FORCIBLY ENTERED A PERSON'S HOME WITHOUT CONSENT OR A WARRANT AND DRAGGED THE PERSON WHO WAS UNCONSCIOUS INTO THE EMPTY HOUSE WHERE HE WAS PREVENTED FROM RECEIVING ASSISTANCE FROM NEIGHBORS AND EMERGENCY CARE THAT HAD BEEN SUMMONED.

The Fourth Amendment's restriction against warrantless entries into one's home provides that such entries are per se unreasonable unless they fall within a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 576, 585 (1967).

Such an exception is the emergency aid doctrine, which provides that the police may enter a dwelling to render emergency aid to a person whom they reasonably believe to be in distress and in need of help. *United States v. Dunavan*, 485 F.2d 201 (1973).

No legitimate reason existed which would have permitted Petitioners to break into Mr. Penilla's home.

Petitioners contend there can be no § 1983 liability when they were merely helping Penilla into his home. This assumes, however, that Mr. Penilla was going into his home before they intervened. He was not. Absent the Petitioner's intervention, Mr. Penilla was going to the hospital.

The emergency which the Petitioners encountered was not

in Mr. Penilla's home, it was on his porch. Because they had no reasonable grounds to believe an emergency was afoot in Mr. Penilla's home, the authority Petitioners rely on is inapposite.

Any argument that Petitioners may make about exigent or emergency circumstances only buttresses the Penillas' contention that Mr. Penilla should have been permitted to benefit from the assistance of his neighbors and the attention of the paramedics and the emergency medical aid which was in route.

Ultimately, the district court and the Ninth Circuit concluded that whether the exception to the warrant requirement justified the entry into Mr. Penilla's home was a question of fact.

The Penilla's respectfully submit that given facts of the present case no question exists as to the impropriety of the entry.

CONCLUSION

For all the foregoing reasons this Petition should be denied.

Respectfully submitted,

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No. 97-664

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Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH SETTLES and IOANE TUA,
Petitioners,

vs.

MICHAEL PENILLA, Administrator
of the Estate of Juan Penilla, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

In support of their Petition for Writ of Certiorari, petitioners JOSEPH SETTLES and IOANE TUA respectfully submit this reply to new points raised in Respondent's opposition brief.

The Petition cites numerous cases from outside the Ninth Circuit showing the lack of accord over a "danger enhancement" exception to *DeShaney* v. *Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). See Pet. for Cert., at 6–9.

Respondent's opposition ignores nearly all those cases. Instead, Respondent cites other cases for the supposed proposition that lower court decisions are in accord.

If anything, Respondent's cases show precisely the opposite.

Respondent relies heavily on *Ross* v. *U.S.*, 910 F.2d 1422 (CA7 1990). As one commentator has noted, though, *Ross* is a highly unexpected judicial development that seems attuned to the *DeShaney* dissent and at odds with the *DeShaney* majority. See 104 HARV. L. REV. 1147, 1150–53 (1991).

Respondent also emphasizes a negative implication he perceives in *Rogers* v. *City of Port Huron*, 833 F.Supp. 1212 (ED Mich. 1993). *Rogers* found no constitutional violation where an inebriated man died after police left him lying unconscious along a roadside. Yet the Third Circuit found virtually identical conduct to violate the Fourteenth Amendment in *Kneipp* v. *Tedder*, 95 F.3d 1199 (CA3 1996).

Which rule is correct?

If judges cannot agree as to what conduct is constitutionally permissible in an emergency situation, how are public rescue workers to know what to do?

It would be detrimental to society for public safety workers to hesitate in a crisis simply because they cannot be certain as to the constitutionality of alternative courses of action.

Citizens' lives are at stake. It is imperative for this Court to provide a definitive answer to the following question: How much latitude do public safety workers have when responding to a crisis before they must account to a federal jury for failing to rescue an endangered citizen?

CONCLUSION

For all of the foregoing reasons, the Petition should be granted.

DATED: November 20, 1997

Respectfully submitted,

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